

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE PHARMACEUTICAL INDUSTRY
AVERAGE WHOLESAL PRICE LITIGATION

MDL No. 1456

THIS DOCUMENT RELATES TO:

ALL ACTIONS

CIVIL ACTION: 01-CV-12257-PBS

Judge Patti B. Saris

**PLAINTIFFS' NOTICE OF SUPPLEMENTAL AUTHORITY ON THE SCOPE OF THE
NOVEMBER 6 TRIAL**

Plaintiffs submit the decision in *State of New York v. Pharmacia Corp., et al.* as supplemental authority on the scope of the trial (attached hereto). Plaintiffs have suggested that such a trial focus on and be conducted on a start to finish of Class 2. The Court in the *State of New York v. Pharmacia* held that knowledge has no relevance to a statutory reimbursement based claim:

Further, defendants also contend that, if they can prove that the state agencies knew that the reported "average wholesale prices" were not the actual prices paid, plaintiff's claims must fail. This argument fails. Reimbursement is based solely upon statutory formulae over which the agencies have no discretion or control. The agencies' understanding of what "average wholesale price" constituted is thus irrelevant.

Id. at 6. In Class 2, where TPPs must pay based on such a formula, knowledge is not relevant to liability under § 93.¹ The *State of New York* decision is supportive of having the Class 2 trial focus on statutory reimbursement issues.

¹ Plaintiffs acknowledge the Court deems knowledge relevant to limitations issues; however, the scope of that knowledge issue as a limitations defense presents a far different inquiry than the expectation or market behavior knowledge issues applicable to Class 3.

DATED: August 15, 2006.

By /s/ Steve W. Berman

Steve W. Berman
Hagens Berman Sobol Shapiro LLP
1301 5th Avenue, Suite 2900
Seattle, WA 98026
Telephone: (206) 623-7292
Facsimile: (206) 623-0594

Thomas M. Sobol (BBO#471770)
Edward Notargiacomo
(BBO#567636)
Hagens Berman Sobol Shapiro LLP
One Main Street, 4th Floor
Cambridge, MA 02142
Telephone: (617) 482-3700
Facsimile: (617) 482-3003

LIAISON COUNSEL

Elizabeth Fegan
Hagens Berman Sobol Shapiro LLP
60 W. Randolph Street, Suite 200
Chicago, IL 60601
Telephone: (312) 762-9235
Facsimile: (312) 762-9286

Eugene A. Spector
Jeffrey Kodroff
Spector, Roseman & Kodroff, P.C.
1818 Market Street, Suite 2500
Philadelphia, PA 19103
Telephone: (215) 496-0300
Facsimile: (215) 496-6611

Kenneth A. Wexler
Jennifer Fountain Connolly
Wexler Toriseva Wallace LLP
One North LaSalle Street, Suite 2000
Chicago, IL 60602
Telephone: (312) 346-2222
Facsimile: (312) 346-0022

Marc H. Edelson
Allan Hoffman
Edelson & Associates LLC
45 West Court Street
Doylestown, PA 18901
Telephone: (215) 230-8043
Facsimile: (215) 230-8735

Shanin Specter
Donald E. Haviland, Jr.
Kline & Specter, P.C.
1525 Locust Street, 19th Floor
Philadelphia, PA 19102
Facsimile: (215) 772-1359
Telephone: (215) 772-1000

**CO-LEAD COUNSEL FOR
PLAINTIFFS**

CERTIFICATE OF SERVICE BY LEXISNEXIS FILE & SERVE

Docket No. MDL 1456

I, Steve W. Berman, hereby certify that I am one of Plaintiffs' attorneys and that, on August 15, 2006, I caused copies of **PLAINTIFFS' NOTICE OF SUPPLEMENTAL AUTHORITY ON THE SCOPE OF THE NOVEMBER 6 TRIAL** to be served on all counsel of record by causing same to be posted electronically via Lexis-Nexis File & Serve.

/s/ Steve W. Berman

Steve W. Berman